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No. 90-1071 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

BARBARA BUFFINGTON, *et al.*,
Petitioners,

v.

BALTIMORE COUNTY, MARYLAND, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court below erred in its fact-bound determination that, in the circumstances of this case, plaintiff's injury was not caused by a municipal custom or policy but, rather, by the actions of individual police officers in contravention of an established policy.

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STATUTE

42 U.S.C. § 1983 ..... *passim*

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents hereby oppose the petition for a writ of certiorari filed by Barbara Buffington, *et al.*, in this case.

STATEMENT

This petition grows out of a suit petitioners brought under 42 U.S.C. § 1983 seeking damages for the deprivation of constitutional rights petitioners' son James allegedly suffered as a result of his suicide while in a Baltimore County jail.[1] Respondents offer a brief counter-

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[1] Petitioners also sought damages under state wrongful death and survival statutes.

statement in order to place petitioners' lengthy recitation of the facts and their central argument—that the court below engaged in improper appellate factfinding—in proper perspective.

1. On the morning of March 19, 1987, petitioners' son, David, notified Baltimore County Police that his brother James had penned a suicide note and had driven off in his parents' automobile, apparently with several of his father's firearms. Shortly thereafter, Officer Lewis Harvey apprehended James and placed him in protective custody in the Wilkens precinct station. After learning of his brother's arrest, David Buffington contacted Officer Harvey to remind him of James' history of emotional problems and to stress that James was at extreme risk of committing suicide. Officer Harvey explained that preparations were being made to transfer James to Greater Baltimore Medical Center for an emergency psychiatric evaluation, and suggested that David press criminal charges to permit the police to hold James in the event the hospital declined to accept an emergency commitment.

Upon arrival at the station, James was handcuffed to a rail beside the station's booking desk where he could be observed by the desk officers. At approximately 6:15 a.m. that morning, Officers Donald Gaigalas and Ronald Tucker took over as desk officers. Ten minutes later, Officer Gaigalas freed James from the rail and placed him alone in the female lockup area. Gaigalas did not remove any of James' clothing and made no provision to keep him under observation. Approximately 45 minutes later, James was found hanged from the cell's horizontal bars by a noose he had made from his pants.

2. In the courts below, petitioners pursued several conflicting theories of liability against the various named defendants. With respect to Officers Gaigalas and Tucker, petitioners argued that the officers' "*depart[ure] from accepted standards and procedures*" led to James'

suicide. Brief of Appellees at 21 (emphasis added). At trial, counsel for petitioners repeatedly elicited testimony that the handcuffing of suicidal detainees to the booking desk was a standard policy and practice in the Wilkens precinct.[2] Counsel likewise demonstrated that the desk officers were aware of this policy. Counsel's cross-examination of Officer Gaigalas, for example, included the following exchange:

> Q: You *knew the rule was that no one being held for an [emergency psychiatric] evaluation was to go into lockup*; you knew that, didn't you?
>
> A: That was Sergeant Yuska and the other supervisors' practice and procedure, yes.

App. 1411 (emphasis added). Counsel further argued that the violation of this policy led directly to James Buffington's death.[3]

Petitioners adhered to this position on appeal. They posited that "all of the officers who came in contact with James *acknowledged the verbal 'standing order' of Sergeant Yuska that no known suicidal detainee should be*

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[2] *See, e.g.*, App. 1161-62 ("It was standard policy on the shift" and "no known or suspected suicide was ever put back in the lockup") (testimony of Officer Harvey); 1206, 1224 ("practice" is for suicidal detainees "to remain at that bar") (testimony of Sergeant Yuska); 1301 (testimony of Officer Gribbin); 1336 (testimony of Officer France); 1367-69 (testimony of Officer Maeser); 1389-90 (Sergeant Yuska's "training and standard instruction" was not to put suicidal detainees in lockup) (testimony of Officer Gaigalas); 1911-12 (there "was an informal policy that suicidal individuals . . . were not to be placed in cells") (testimony of petitioners' expert).

[3] On direct examination, counsel for petitioners asked Sergeant Yuska:

> you would agree, would you not, that the failure of your desk officers to inform you that Buffington was suicidal *was a violation of your training and your practices and directly led to the suicide of James Buffington, wouldn't you?*

App. 1224 (emphasis added).

put into a lockup." Brief of Appellees at 16 (emphasis added) (citing record); see also *id.* (referring to "verbal, unwritten policy of keeping suicidal detainees at the front desk"). Petitioners argued that "Officer Gaigalas' failure to conform to accepted standards and procedures 'could only be described as shocking,' " and that "Officer Tucker's failure to ensure that James stayed handcuffed to the rail at the front desk . . . was an 'extremely grievous' departure from accepted police standards and procedures." *Id.* at 21-22 (quoting record).

Petitioners sought to hold the County and Chief of Police Behan responsible for James' suicide on two "alternative" theories—"failure to train" and "condoned custom"—both of which conflict with the theory of liability offered against Officers Tucker and Gaigalas. Thus, despite having established that James' death resulted from the desk officers' violations of precinct policy and practice, petitioners argued that James' suicide was also the result of Chief Behan's failure "to promulgate a *written* regulation requiring the constant monitoring of suicidal detainees" (*id.* at 15, emphasis added), and his failure to implement suicide screening and prevention training programs. In addition, and as a supposedly "alternative" theory of liability, the Buffingtons argued that the County had a custom of condoning the type of inadequate handling of suicidal detainees that led to James' death. In this regard, petitioners relied, in part, upon the department's purported "cover-up" investigation of James' death—one aspect of which, petitioners argued below, was the investigating officer's failure to "comment upon the . . . *violation of* [*the precinct's*] *policy of constant observation,*" (*id.* at 24) (emphasis added), or even to "refer to Sergeant Yuska's *standing orders regarding suicidal detainees.*" *Id.* at 28 (emphasis added).

The case was submitted to a jury with instructions that it "could find more than one proximate cause of the

suicide." *Id.* at 33. Based on these instructions, the jury returned verdicts against Officers Tucker and Gaigalas, Chief Behan and the County on petitioners' § 1983 and state law claims. The jury, however, rejected petitioners' claim against the precinct captain and four other officers, and rejected the claim that the County, Chief Behan, the precinct captain and another officer had participated in a conspiracy to cover-up the investigation of James' suicide.

3. On the same day the district court denied respondents' motion for judgment notwithstanding the verdict, this Court ruled, in *City of Canton* v. *Harris*, 489 U.S. 378 (1989), that municipal liability cannot be premised on proof "that an injury or accident could have been avoided if an officer had had better or more training." *Id.* at 391. The Court held that, to establish municipal liability on a "failure to train claim," a plaintiff must demonstrate "that the deficiency in training *actually caused* the police officers' " misconduct. *Id.* (emphasis added).

On the basis of this intervening decision, a unanimous panel of the Fourth Circuit reversed the § 1983 verdicts against the County and Chief Behan. The court accepted petitioners' evidence and contention that "better suicide prevention training, closer adherence to national standards on jail suicide prevention, written regulations, or some combination of these would have served to avoid [James Buffington's death]." Pet. at 17a. Nevertheless, the court held,

> *Canton* has made clear that municipal liability under § 1983 may not rest on such proof. This particular injury would have been avoided by the individual desk officers taking the minimal preventive step of following the precinct's official policy and customary practice of keeping Buffington handcuffed to the rail.

Id. at 17a-18a (citations omitted). Put differently, the court below recognized that, under *Canton*, petitioners'

theories of individual and municipal liability were mutually exclusive: Officers Gaigalas' and Tucker's failure to follow the customary precinct practice (of which they were both aware) of handcuffing suicidal detainees to the booking desk, and the County's failure to adopt a variety of suicide prevention programs, simply could not *both* be the "moving force" behind James Buffington's death. *Canton*, 489 U.S. at 389. On the particular facts of this case, the Fourth Circuit's decision was manifestly correct and raises no issues warranting review by this Court.

REASONS FOR DENYING THE PETITION

Although petitioners purportedly offer three independent reasons justifying an exercise of this Court's certiorari jurisdiction, all three are simply different formulations of the same claim—namely, that the Fourth Circuit engaged in impermissible appellate factfinding. Even if true, this entirely factbound claim raises no questions worthy of this Court's attention. In any event, the unanimous decision below was factually correct, and is consistent with municipal liability decisions in other circuits as well as the governing standards established by this Court.

A. Petitioners contend that the decision below creates a sharp conflict among the circuits concerning the proper role of the jury in determining issues of causation in "failure to train" and "condoned custom" cases. As petitioners themselves acknowledge, however, this supposed conflict only arises "[o]nce it is understood that the Fourth Circuit's view of the 'official policy and customary practice' [of the Wilkens precinct] is contrary to the record in support of the verdict." Pet. at 25.

Petitioners' argument is nothing more than a strained attempt to disguise a claim of improper appellate factfinding as a conflict among the circuits. The court below did not rule, or even intimate, that questions of causation

in cases such as this are not for the jury, or that they necessarily must be "decided as a matter of law in cases proceeding on both failure-to-train and condoned custom theories." Pet. at 26. On the contrary, the court canvassed the evidence petitioners marshalled concerning the lack of written regulations and training, the failure to adhere to national standards, the prior suicide expisodes and the lack of disciplinary actions (see *id.* at 6a, 17a), but found this evidence insufficient, under the circumstances of this case, to permit the jury to find that any County policy or custom was the "moving force" causing James Buffington's death.

The entire predicate underlying petitioners' claim of improper appellate factfinding, moreover, is flatly incorrect. Much of their 25-page factual recitation is devoted to disputing the Fourth Circuit's determination that the Wilkens precinct had a policy or custom of handcuffing suicidal detainees to the booking desk railing. Yet it was petitioners *themselves* who introduced the evidence of that policy and argued to the jury and to the court of appeals that Officers Gaigalas' and Tucker's knowing violation of that policy led to James' death. See *supra* at 2-4 & nn. 2-3. Indeed, while petitioners now suggest that the Fourth Circuit's determination "can only be based upon an extremely selective reading of . . . isolated testimony" (Pet. at 18), the court below was *obligated* to accept the existence of such a policy, inasmuch as the existence of that policy was essential to the jury's verdict against the desk officers.[4]

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[4] It is thus unnecessary to address the evidence that allegedly undermines the existence of the precinct policy (see Pet. at 19-20). Nevertheless, it is worth pointing out that petitioners' use of this testimony is as disingenuous as their attempt to disavow their own evidence below. In the court of appeals, petitioners noted that "all of the officers who came in contact with James acknowledged the verbal 'standing order' of Sergeant Yuska that no known suicidal detainee should be put into lockup," Brief of Appellees at 16, but argued that, because the policy was unwritten, other County

Given the existence of the Wilkens precinct policy, the Fourth Circuit's further determination that petitioners' remaining evidence was insufficient to establish municipal liability under *Canton*'s causation standard is unassailable. As petitioners themselves argued below, it is undeniable that compliance with Sergeant Yuska's standing order would have prevented James' suicide, and that Officers Tucker's and Gaigalas' violation of that policy caused James' death. All of the evidence concerning the County's inadequate preventive measures merely demonstrates that the "injury or accident could have been avoided if [Tucker and Gaigalas] had had better or more training." See *Canton*, 489 U.S. at 391. This Court, however, has made clear that such proof is inadequate. "Such a claim could be made about almost any encounter resulting in injury, yet not condemn the adequacy of the [Wilkens precinct policy, which] enable[d] officers [Tucker and Gaigalas] to respond properly to the usual and recurring situations with which they [had to] deal." *Id.*

This factbound determination, moreover, does not conflict with decisions in other circuits. The decisions petitioners cite involving the sufficiency of causation evidence in municipal liability cases[5] all recognize, as did the

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witnesses were able to deny "the very existence of a policy . . . [when] convenient." *Id.* at 15. Thus, petitioners impugned the integrity of the very testimony they now claim the Fourth Circuit improperly ignored. See also *id.* at 16 ("the verbal, unwritten policy of keeping suicidal detainees at the front desk was *allegedly* unknown to every high ranking official within the department who testified at trial, including Major Hauf, Major Shinnamon, and Colonel Messina") (citations to the record omitted; emphasis added).

[5] Two of the cases petitioners cite do not involve municipal liability at all, but rather the liability of individuals under § 1983. See *Greason* v. *Kemp*, 891 F.2d 829 (11th Cir. 1990) (scope of qualified immunity); *Gutierrez-Rodriguez* v. *Cartagena*, 882 F.2d 553 (1st Cir. 1989). Another pre-dates this Court's decision in *Canton*

Fourth Circuit here, that the municipal policy must be the moving force behind the constitutional injury. See *Berry* v. *City of Muskagee*, 900 F.2d 1489, 1499 (10th Cir. 1990) (there must be "a direct causal connection between the municipal policies in question and the constitutional deprivation"); *Santiago* v. *Fenton*, 891 F.2d 373, 382 (1st Cir. 1989) (plaintiff's claim must "implicate the [municipal] policy as the moving force [behind] the constitutional deprivation") (citations and internal quotation marks omitted); *Bordanaro* v. *McLeod*, 871 F.2d 1151, 1162 (1st Cir.) ("municipal policy must be affirmatively linked to and the moving force behind the constitutional violation"), *cert. denied*, 110 S.Ct. 75 (1989). Simply because courts applying this same standard may have reached different results concerning the sufficiency of *different* evidence in no way demonstrates a division among the circuits.[6]

B. Petitioners argue that this Court should review the decision below in order to establish the "sufficiency of causation proof in cases based on alternative theories of failure to train and condoned custom and failure to discipline." Pet. at 26. There are at least two reasons why this Court should decline this invitation.

First, there is not the slightest indication in *Canton* itself that the standard of *causation* in municipal liability cases should vary depending upon whether the plaintiff proceeds on a failure to train or condoned custom theory. On the contrary, *Canton*'s causation standard is derived from the long-standing principle that a "municipality can

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by six years, see *Trudeau* v. *Wyrick*, 713 F.2d 1360 (8th Cir. 1983), and a fourth does not address the question of causation at all. See *Kerr* v. *City of West Palm Beach*, 875 F.2d 1546, 1555-57 (11th Cir. 1989) (discussing existence of municipal policy).

[6] In fact, in *Santiago* v. *Fenton*, the First Circuit affirmed summary judgment in favor of a municipality after concluding that the plaintiff's factual allegations "fail[ed] to reach the high standard the Supreme Court has set out for a finding of liability for inadequate training of police officers." 891 F.2d at 381.

be found liable under § 1983 only where the municipality *itself* causes the constitutional violation." 489 U.S. at 385 (emphasis in original) (citing *Monell* v. *New York City Dept. of Social Servs.*, 436 U.S. 658 (1978)). Thus, whether a plaintiff proves fault through a policy or custom, he or she must demonstrate that the policy or custom "actually caused" the injury at issue. The Fourth Circuit's decision in this case is entirely consistent with this principle.

Second, *Canton*'s causation standard is so obviously applicable to condoned custom cases that petitioners are unable to identify a single decision even questioning its applicability in such cases, let alone a decision applying a different standard. Indeed, in the one case they cite that involved condoned custom and inadequate training claims, the court applied the same standard of causation to both claims. See *Bordanaro*, 871 F.2d at 1157 ("a municipal *custom* must have been the 'moving force' behind the plaintiff's injury") and *id.* at 1162 ("municipal *policy* must be . . . the moving force behind the constitutional deprivation") (emphases added). That decision, like the Fourth Circuit's here, is clearly correct. In the absence of any confusion, let alone division, in the lower courts, there is simply no reason for this Court to "further shape the contours of municipal liability in the context of litigation prosecuted on alternative theories of failure to train and condoned custom." Pet. at 27.[7]

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[7] Even assuming this causation question were otherwise worthy of, and ripe for, consideration, this case is not the appropriate vehicle for addressing the issue. While petitioners now suggest that they pursued two distinct theories of liability below, they have used their theoretical labels interchangeably throughout this case, suggesting at different times, for example, that the County's inadequate training both "perpetuated the department's custom of deliberate indifference" (Pet. at 7; Brief of Appellees at 17), and "proved" the existence of that custom. Brief of Appellees at 38. Thus, here as in *Canton* itself, petitioners' condoned custom claim "appears to be little more than a restatement of [a] failure-to-train as policy claim." 489 U.S. at 386 n.5. This confused presentation

C. Finally, petitioners suggest that this Court should exercise its supervisory powers in order to remedy the Fourth Circuit's alleged violation of their Seventh Amendment right to a jury trial. As respondents have previously demonstrated, however, the decision below was factually and legally correct: applying the proper standard of review, the court found that, in the unique circumstances created by the verdict against Officers Tucker and Gaigalas, petitioners' evidence was insufficient to satisfy *Canton*'s causation standard with respect to the municipality itself. That determination did not deny petitioners their right to a jury trial, and provides no occasion for this Court to exercise extraordinary powers simply to "reaffirm" and "repeat[]" well-settled principles of appellate review. Pet. at 29.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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precludes any meaningful examination of the causation question petitioners proffer.